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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CAPITOL RECORDS, LLC,

4 Plaintiff,

5 v.

12 CV 95 (RJS)

6 REDIGI INC.,

7 Defendant.

8 -----x  
9 New York, N.Y.  
February 6, 2012  
3:30 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13 APPEARANCES

14 COWAN, LIEBOWITZ & LATMAN  
15 Attorneys for Plaintiff  
16 BY: RICHARD MANDEL  
JONATHAN KING

17 RAY BECKERMAN, PC  
18 Attorneys for Defendant  
19 BY: RAY BECKERMAN  
M. TY ROGERS

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(In open court, case called, appearances noted)

THE COURT: All right. Mr. Rogers, good afternoon to you, and I should note that the docket sheet has you at Vandenberg & Feliu.

MR. ROGERS: That was my former firm. I changed everything in the Southern District system. I'm surprised. I will look into that.

THE COURT: Check into it. Maybe you didn't make a copy of it when they moved it over. That was a little copyright joke.

Good afternoon. And I gather we have some others in the gallery interested in the subject or more than just a passing interest in the subject.

We're here on I guess two potential motions. I have the motion of plaintiff's for a preliminary injunction. So I got the opening brief that was dated January 6 as well as -- I'm sorry, the complaint is January 6, the answer is January 19, and I have the opening brief January 26, the reply -- excuse me, the response January 27, it's date of docketing, then the reply brief February 1st. I also have premotion letters related to defendant's contemplated motion for a summary judgment, so I have a January 19 letter from Mr. Rogers and a January 24 and letter in response by Mr. Mandel.

So that's what I have got. I have got something from

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1 counsel from Google that I have already dealt with, but nothing  
2 else from the parties. Right?

3 MR. MANDEL: That's correct, your Honor.

4 THE COURT: I find this to be a fascinating issue. We  
5 raised a lot of technical and statutory issues that make this  
6 kind of a niche case, as far as I'm concerned.

7 So I have read the papers, and I read them carefully,  
8 but I'm happy to hear further argument, particularly since  
9 defendants have not had a chance to respond to the reply  
10 papers, which I guess fine tune some of the arguments that were  
11 made in the opening brief. I'm curious to have a little oral  
12 argument now.

13 So it's plaintiff's motion, so we'll start with  
14 plaintiffs. And I think there's no dispute as to what the  
15 standard is here. I think we ought to start with irreparable  
16 harm, because it seems to me that this is the kind of thing  
17 that money should take care of.

18 Mr. Mandel?

19 MR. MANDEL: Your Honor, we don't think that money  
20 really will adequately address the injury here, and I think  
21 there obviously was a long history for many years where  
22 irreparable harm was presumed in copyright cases.

23 Now obviously in *Salinger* the Second Circuit said that  
24 is no longer the case, reading the Supreme Court's opinion in  
25 *Ebay*. But at the same time, they were careful to point out as

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1 a empirical matter it still well may be that most copyright  
2 plaintiffs will be able to establish irreparable harm. Justice  
3 Roberts' current opinion in *Ebay* where he talks about we're not  
4 writing on a blank slate now, obviously years of history can be  
5 worth a lot of logic. And I think that really is the case  
6 here. There is irreparable injury, and for a number of  
7 reasons.

8 First of all, with respect to monetary damages, I  
9 think there's a real concern whether this defendant would be in  
10 a position to provide the kind of judgment that Capitol is  
11 entitled to.

12 THE COURT: Why? Because they're pretty new?

13 MR. MANDEL: Not just that, in response to the  
14 preliminary injunction motion they essentially said that an  
15 injunction would put them out of business. And so it seems to  
16 me that they're really saying their business model, which they  
17 decided to go forward on knowing -- they had to know that there  
18 was significant risk when they went forward with that business  
19 model, and they're saying if they're wrong, they're out of  
20 business.

21 THE COURT: That's not the same as saying you're  
22 judgment proof, is it?

23 MR. MANDEL: I think there's a question if there's  
24 added business. The idea of a beta start up company that has  
25 just been in testing mode that goes into it knowing there's a

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1 serious legal question and saying that they'll be out of  
2 business if they're not allowed to do this, I think there's  
3 real question to whether we get a statutory damage award for  
4 hundreds of recordings that could add up to million of dollars,  
5 there is no way they would be able to compensate us for that.

6 THE COURT: But that sounds like speculation more than  
7 anything. You just are surmising because they're a start up,  
8 because an injunction in their own mind would potentially  
9 threaten the existence of a company whose entire reason for  
10 existence is this technology that they're touting, that this  
11 must mean they're judgment proof.

12 MR. MANDEL: I don't think it must mean, but I think  
13 it raises a serious question about it such that I think Capitol  
14 shouldn't be in a position to be forced to take that risk.  
15 Because when you really look at the respective hardships here,  
16 the defendant went forward with a business plan where, we  
17 submit -- and this obviously ties back to the likelihood of  
18 success -- we submit there is really no colorable offense or  
19 reason that they are able to do the things that they are doing  
20 here.

21 And the reality of the situation is that they had to  
22 know that, and they took the risk. And what Capitol is saying  
23 is our most valuable asset is our copyrights. Why should we  
24 have to put that at risk while they're in testing mode getting  
25 an opinion as to whether what they do is valid? Wouldn't the

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1 better thing to do here be to establish that you have some  
2 possibility of actually having a real defense here?

3 THE COURT: That's sort of setting the standard for a  
4 preliminary injunction on its head. It says we'll presume a  
5 preliminary injunction until they can establish they have a  
6 likelihood of success in defending.

7 MR. MANDEL: I'm speaking to the balance of hardships.

8 THE COURT: I'm asking about irreparable harm.

9 MR. MANDEL: So beyond just the money damage question,  
10 I think there is also irreparable injury here in the sense that  
11 this is being touted and promoted to the public as legal in  
12 their Web site. They're saying this is a legal alternative.  
13 The whole idea of using a digit marketplace is something that  
14 we submit is something that is not legally cognizable. And  
15 being out there and creating this confusion in the public mind  
16 and opening up this Pandora's box inviting people to infringe  
17 in a similar manner, saying well, if I take steps to delete my  
18 copy after I do this, I can do this wonderful sale, there's a  
19 real risk that essentially the infringement is going to be very  
20 widespread and Capitol will lose control of its assets, its  
21 copyrights, its most valuable assets.

22 THE COURT: Dangerous legal theory is a basis for  
23 establishing irreparable harm?

24 MR. MANDEL: Untenable legal theory that has no  
25 support. And that, we submit, ties back to whether we

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1 established that we're right, but we think it's pretty clear  
2 it's not legally supportable. And to be able to create  
3 confusion in the public mind this is something that is legal,  
4 that people have the right to duplicate their files, and as  
5 long as after they submit it --

6 THE COURT: But do you have authority for this  
7 proposition? Public market confusion is people will think this  
8 is Pepsi, for crying out loud, and it's not Pepsi. People will  
9 think this is a legally defensible theory that they're  
10 operating under, and I can't think that's a case of irreparable  
11 harm.

12 MR. MANDEL: We haven't had a lot of case law since  
13 *Salinger*. We have decades of experience where it was routinely  
14 presumed there was irreparable harm once likelihood of success  
15 was established in a copyright case. There hasn't been a lot  
16 of fleshing out of the legal standard. You have the history of  
17 a copyright context, given the nature of the injury, the loss  
18 of control of your property rights.

19 The fact that essentially the statutory scheme is  
20 being turned on its head, instead of having a right to exclude  
21 people from making reproductions and from using your  
22 copyrighted material, you are sort of turning it the other way  
23 and setting up almost a compulsory licensing scheme or some  
24 kind of statutory exception that's not there. So we do think  
25 that that is unfair and not what is intended in the copyright

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1 area, because this is intangible property that is very  
2 difficult to control, and it has a tremendous value that is not  
3 easy to quantify.

4 THE COURT: I'm sorry to interrupt you. That's one of  
5 the benefits of having the robe is I'm able to do that. And  
6 since I'm the fact finder, or at least the decision maker here,  
7 I apologize. So everybody, I will interrupt you from time to  
8 time, not maliciously, but because I have a short attention  
9 span.

10 So my question is even outside of the copyright area,  
11 irreparable harm has to be established for a preliminary  
12 injunction. Are you aware of any other authority in which the  
13 dangerousness of a legal theory is advanced as a basis for  
14 establishing irreparable harm?

15 MR. MANDEL: I'm not, but I guess I wouldn't say it's  
16 the dangerousness of the legal theory, what I will say it's the  
17 unsupportable contention there's right to do something that  
18 there is clearly not a right to do. It's misinformation to the  
19 public about the applicable statutory scheme. There's  
20 misinformation about the contributions that are supposedly made  
21 to the record labels and to the music community and all of  
22 those things that we think do fall into place in terms of  
23 establishing irreparable harm combined with just the loss of  
24 control and the difficulty of quantifying the damage when your  
25 intangible property right that you have a right to generally



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1 exclude others from using is basically being cast aside and  
2 you're told well, you will stand here and take it at face  
3 value, that at the end of this, money will be enough.

4 THE COURT: But you're saying that lost sales would  
5 not be the measure, there are certain people you would not sell  
6 to under any circumstances.

7 MR. MANDEL: No, I'm saying the danger here goes  
8 beyond the specific lost sales that may quantifiable. There  
9 may be other infringements that are being encouraged by the  
10 activity. There is misinformation being communicated to the  
11 public.

12 THE COURT: But the encouragement of other  
13 infringement, is that anywhere cited as a basis for  
14 establishing irreparable harm? I haven't seen it.

15 MR. MANDEL: I haven't seen it either, but as I said,  
16 copyright plaintiffs have not had a long period of time where  
17 they have actually been required to prove much. It's been  
18 presumed for decades in this circuit and elsewhere that  
19 irreparable harm is almost assumed. And I think what the  
20 Supreme Court said is OK, fine, that has changed, and you can  
21 no longer rely on that presumption, but we're also not writing  
22 on a clean slate here. There's a reason why that presumption  
23 existed for 30 years, and it is because of recognizing the  
24 nature of the kind of injury that's at play when you deal with  
25 copyrighted intellectual property.

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1 THE COURT: But here we're talking about lost sales  
2 for which they're getting 39 cents a song and you or your  
3 licensees would be getting a buck and a quarter. That seems to  
4 me pretty easy to quantify and pretty easy to establish damages  
5 on, and a money judgment should take care of the whole thing.

6 MR. MANDEL: Potentially, assuming there is money to  
7 withstand a judgment, notwithstanding that they're a data  
8 company that would be out of business by virtue of a decision  
9 that their business model doesn't work.

10 THE COURT: But then it's your burden to establish  
11 that they don't have the wherewithal to withstand the judgment,  
12 not their obligation to prove they can, right?

13 MR. MANDEL: We think there's significant risk there,  
14 that you have to look at it in context. And I think there is  
15 also a risk that the marketplace in general -- that there will  
16 be harm beyond that not just from their service but from other  
17 people who will infringe.

18 I have said what I have to say. I don't know that I  
19 can add anything to it. But we do believe that the strong  
20 tradition in copyright cases of granting and presuming  
21 irreparable harm flows from a natural recognition of the nature  
22 of that right, and we think that continues to be at play even  
23 more when you're dealing with a defendant that has no real  
24 basis to do what it's doing under the law.

25 THE COURT: All right. Let's take these one element

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1 at a time. So I'm happy to hear -- who is going to carry the  
2 ball for the defense, Mr. Rogers or Mr. Beckerman?

3 MR. BECKERMAN: I will.

4 THE COURT: Let's talk about irreparable harm. If  
5 they win, as they seem confident they're going to, are you  
6 going to be -- is there any prospect of your client having any  
7 assets from which to pay a money judgment?

8 MR. BECKERMAN: I haven't asked them that.

9 THE COURT: All right. Why not? You don't want to  
10 know the answer or you don't think it's relevant?

11 MR. BECKERMAN: The question is whether the plaintiff  
12 will be made whole of an award by money judgment. And I have  
13 asked them -- we put in our papers that they keep very careful  
14 records of every single transaction, so there won't be any  
15 problem in computing the amount of damages.

16 THE COURT: But that's not my question. My question  
17 is, assuming you're right about quantifying the damages, if  
18 there's going to be any prospect of them recovering on the  
19 damages. Because if the answer is "not a chance," it seems to  
20 me that might be pretty significant for establishing  
21 irreparable harm. Don't you think?

22 MR. BECKERMAN: I have no idea. The plaintiff has the  
23 burden of proving that and hasn't shown that. If that were to  
24 be a basis for preliminary injunction, then why even come to  
25 court when you're a small company that doesn't have the kind of

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1 money the plaintiff does?

2 THE COURT: It's not --

3 MR. BECKERMAN: What is interesting is everything that  
4 Mr. Mandel is saying is based on his statements that we  
5 obviously don't have a defensible legal model. But yet, if it  
6 were so clear we didn't have a defensible legal model, it's  
7 unclear to me why he hasn't been able to make out a case of  
8 copyright infringement.

9 THE COURT: I'm not sure that I follow you. We keep  
10 moving from the element I want to focus on. But what are you  
11 talking about that he hasn't made out a case?

12 MR. BECKERMAN: He brings up in the discussion of  
13 irreparable harm that we have an indefensible legal model, but  
14 he hasn't been able to show any instance of copyright  
15 infringement. There isn't any part of our process that  
16 infringes anyone's copyrights.

17 And his papers are a moving target. They say -- they  
18 keep attacking uploads without their permission and downloads  
19 without their permission, then saying they're not attacking the  
20 uploads and downloads, they're attacking the sale.

21 THE COURT: I don't think that's a fair  
22 characterization of his papers. I think he's saying the  
23 uploading and downloading that you seem to concede in your  
24 papers require the kind of copying that the Copyright Act  
25 prohibits.

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1 That's your point, right, Mr. Mandel?

2 MR. MANDEL: Yes, your Honor.

3 THE COURT: So that's what he's saying. Whether he is  
4 right is another story, but that's what he's saying.

5 MR. BECKERMAN: The uploading and downloading are --  
6 if they did not have all the verification technology, it will  
7 still be protected as a fair use. Uploading to a cloud and  
8 downloading is a quintessential fair use. And they claimed --  
9 after Google raised that concern, they claim they're not  
10 raising that issue, even though they repeatedly state in their  
11 motion papers that they repeatedly attacked the uploads and  
12 downloads.

13 Now then on the site itself they falsely claim that  
14 there's a copy made, but there is no copy made. The sale  
15 transaction which take place is done without copying, it's done  
16 with the exact file that's uploaded. The record locator is  
17 simply pointed one, the sale transaction takes place, and the  
18 concomitant transaction, the actual file stays exactly where it  
19 is, it is not changed, and it is not copied, it's simply owned  
20 by someone else.

21 THE COURT: Well, what you said, page 9 of your  
22 opposition brief, the only copying which takes place in the  
23 ReDigi service occurs when a user uploads user files to the  
24 ReDigi cloud, thereby storing copies thereof in the user's  
25 personal Cloud locker, thereby placing copies of files on his

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1 or her computer.

2 MR. BECKERMAN: It's a single file, unique file. It's  
3 the same unique file, cannot be uploaded twice. Plus, it is  
4 not even permitted to be maintained on the user's computer on  
5 attached devices. The software requires it. So there's a  
6 single instance of a file, and after that single instance is in  
7 their cloud locker and has passed all the verification tests,  
8 at the client level and then at the sever level, then it's  
9 something which is accepted into the cloud locker.

10 THE COURT: All right. Again, I want to stay focused  
11 for now on the irreparable harm.

12 So you're not sure whether your client has the ability  
13 to pay a money judgment because you haven't asked. But you're  
14 suggesting it's plaintiff's burden, and they haven't proven  
15 that your client can't. Right? That's your basic argument for  
16 irreparable harm.

17 MR. BECKERMAN: I have not asked any client whether,  
18 if the plaintiffs were to get a large money judgment, whether  
19 they will be able to pay it or not. I have collected judgments  
20 in many cases where the defendant did not have money to pay a  
21 judgment, but nevertheless assets or income or other items were  
22 found.

23 THE COURT: But you don't know one way or the other.

24 With respect to the argument that there are other  
25 harms that result that can't be compensated for by a money

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1 judgment, your response to that?

2 MR. BECKERMAN: What are they? There's absolutely  
3 nothing. This is just about money. It's just about the desire  
4 to suppress competition. It's got -- there's nothing in their  
5 papers about anything but money. The shareholders of Capitol  
6 Records are going to go to bed crying at night? It's absurd.  
7 Capitol Records will go out of business? It's ridiculous.

8 THE COURT: I don't think that's the suggestion. I  
9 don't think anybody suggested Capitol Records is going to go  
10 out of business. I think the concern is whether or not they  
11 will be able to collect on a money judgment or whether there is  
12 a violation of the Copyright Act that can't be otherwise  
13 compensated for.

14 MR. BECKERMAN: Which they have shown none, no  
15 violation of the Copyright Act. They have made up facts which,  
16 if they were true, would be copyright violations, but they're  
17 non-existent facts they made up. Many of them were facts they  
18 themselves could easily verify but they chose not to and put in  
19 no evidence by an investigator or anyone like that who would  
20 claim to have witnessed the contract infringement. Instead,  
21 they have two declarations of attorneys based on peeking at the  
22 Web site.

23 THE COURT: All right. You indicate and you have an  
24 affidavit to that effect, that your client keeps track of every  
25 sale they make, and so it's very easy to ascertain the number

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1 of sales.

2 MR. BECKERMAN: That's correct, your Honor.

3 THE COURT: No question about that in your mind,  
4 right?

5 MR. BECKERMAN: There is no question about that.

6 THE COURT: OK.

7 MR. BECKERMAN: And they keep records of other things,  
8 too. They keep records of every single unique file that passes  
9 through.

10 THE COURT: Every unique file that passes through,  
11 what does that mean?

12 MR. BECKERMAN: Every file that passes through the  
13 marketplace. So not only is there a record of the buying count  
14 and selling count, there's also a record of the exact file,  
15 because their software is designed to ensure that that file  
16 never gets sold there again except by the authorized -- the  
17 true owner.

18 THE COURT: Well, all right. I think we're drifting  
19 into a different element.

20 With respect to irreparable harm, I think you said  
21 what you plan to say, right?

22 MR. BECKERMAN: Yes, your Honor.

23 THE COURT: Is there anything that you want to say in  
24 response?

25 MR. MANDEL: Very quickly, your Honor.



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1 First of all, with respect to precedent, *Salinger*  
2 itself talks about marketplace confusion, so there is some  
3 precedent. That language actually appears in *Salinger*, which  
4 is a copyright case.

5 THE COURT: But that's the confusion that somebody  
6 will think JD Salinger wrote the darn thing when it is Norah  
7 Jones that recorded the album.

8 MR. MANDEL: There's a recognition there can be other  
9 types of confusion that take place in a copyright context that  
10 could bear on whether it's irreparable harm or not. That's not  
11 traditionally a copyright interest, the idea of who wrote the  
12 work is really more in the nature of a trademark kind of  
13 injury, but yet in the copyright context they find that's  
14 potentially irreparable harm, irreparable injury. It may be  
15 somewhat new, because there frankly isn't a lot of law that  
16 employs *Salinger* and looked at what a copyright owner has to  
17 show, but it's not as if there is no idea for the support that  
18 that type of injury, that could be irreparable harm.

19 THE COURT: But the injury that you are talking about  
20 is the same injury that flows from them defending this suit,  
21 right? You're saying that's a dangerous thing to be saying  
22 this is legal. Whether they say it on their Web site or say it  
23 in their answer, that is going to perhaps embolden or mislead  
24 someone to violate copyright law. That strikes me as nutty,  
25 for irreparable harm, for defending the suit or bringing --

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1 MR. MANDEL: Obviously if your Honor didn't find it  
2 likely to establish success on the merits, that wouldn't be the  
3 case, but I think that we'll obviously talk about that. But I  
4 think once you look at it and make a determination it is likely  
5 that we're going to succeed on the merits, I don't think it's  
6 crazy at all that somebody should be able to encourage people  
7 to infringe by engaging in a model that finds no statutory  
8 support and that is unlikely to ever be successful in a  
9 courtroom.

10 THE COURT: It seems to me this is really an argument  
11 that likelihood of success on the merits equals irreparable  
12 harm, when has already been rejected.

13 MR. MANDEL: But the other point on irreparable harm  
14 in terms of monetary -- whether they could satisfy a judgment,  
15 obviously it's difficult for us to satisfy that burden going in  
16 without any discovery, without an opportunity to know how the  
17 copy is capitalized. And now Mr. Beckerman is saying today "I  
18 didn't ask," so he's not in a position to make any  
19 representations to the Court.

20 We would suggest that if that really needs to be  
21 shown, that maybe we be given an opportunity for some expedited  
22 discovery to find out exactly what the level of capitalization  
23 here is and what the likelihood is that they really are going  
24 to be able to satisfy a potential substantial judgment. If  
25 that is something -- that's something we couldn't obviously in

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1 our moving papers at this juncture possibly have met the burden  
2 on, but there's enough suggestion just in the response  
3 saying -- and I think their quote in The New York Times, "If we  
4 can't do this, we're out of business," the idea that they will  
5 leave money around to satisfy a big judgment I think is a lot  
6 for us to take at face value. So we would like an opportunity  
7 maybe to have some expedited discovery on that point.

8 THE COURT: But it seems to me that since this is the  
9 service they provide, to be enjoined from providing this  
10 service would almost by definition put them out of business,  
11 wouldn't it? It's not like they make colas and record players  
12 and airplane engines as well so that business continues.

13 MR. MANDEL: They have told us they do storage. They  
14 tried to make the whole defense be about storage. So  
15 presumably they could still do that. But beyond that, this  
16 motion only deals with Capitol's recordings, it's not going to  
17 enjoin them from selling the other labels' recordings. And  
18 what the other labels decide to do or what deals they may or  
19 may not be able to strike with the other labels is entirely  
20 open. But it's certainly not the case by not being able to  
21 distribute Capitol's recordings they're out of business.  
22 They're out of the business of during the pendency of this  
23 trial, until trial, of distributing Capitol's recordings. So  
24 it is more limited.

25 THE COURT: OK. So irreparable harm, I think I have

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1 heard what I'm going to hear.

2 Let's now talk about likelihood of success on the  
3 merits, which is what I think everybody really wants to talk  
4 about.

5 MR. MANDEL: In terms of likelihood of success, first  
6 of all, as your Honor pointed to, we think the admission at  
7 page 9 of their brief that basically copying take place to  
8 upload to the cloud and download to the locker is really almost  
9 dispositive here. It's an admission there is an act of  
10 reproduction. That is in violation certainly of the prima  
11 facie right of the copyright owner under 106 to have exclusive  
12 rights and not to have others reproduce it. And the question  
13 becomes: Is there some defense that would allow that  
14 reproduction to take place?

15 THE COURT: They have offered two, fair use of  
16 essential step doctrine.

17 MR. MANDEL: But when you actually look at the  
18 argument on them, they're arguing defending a case that we  
19 never brought. This case was brought because there's an online  
20 supposed resale market for digital music, and that's what  
21 sparked the complaint, and that's what we thought we made clear  
22 in our papers. To the extent there was any confusion, I think  
23 in our reply papers we certainly made it clear beyond question  
24 as to what the nature of the injury that we're talking about  
25 here is. So the question is: Is there a defense? And when

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1 you look at fair use, their whole defense on fair use basically  
2 presupposes that we're challenging just the mere act of  
3 storage.

4 THE COURT: That's my question to you. So if someone  
5 just decided to store digital recordings that they purchased  
6 through iTunes, they wanted to store it in a cloud, that  
7 requires copying, according to your papers. Right?

8 MR. MANDEL: Yes. And that's not what we're  
9 challenging here.

10 THE COURT: But why not? So what is the difference  
11 between what is going on here that you are challenging and the  
12 hypothetical I just supposed?

13 MR. MANDEL: Because what is really going on, what  
14 their entire Web site talks about, their Facebook page,  
15 everything, is a resale market, the ability not to store it,  
16 but to sell it. It's stored in the cloud for the purpose of  
17 resale.

18 THE COURT: But well, it's stored in the cloud, and  
19 the process of storage requires a copying. And that process  
20 you're saying -- I think you're conceding is not a violation of  
21 the Copyright Act.

22 MR. MANDEL: For purposes of this case, we're not  
23 making that claim. We're not challenging that. What we're  
24 saying is that you can't subdivide what they're doing. And  
25 they're really saying essentially user A starts out, and he can

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1 start the copy. So his is fair use. User B, who bought the  
2 file, they can download it because they're taking it from the  
3 cloud to their computer. But at the end of the day, what has  
4 really happened is that file has been distributed, has been  
5 transmitted from the first user to the second.

6 THE COURT: No question. So I have my little iPod  
7 player right here and I have all the great Bee Gees hits, and I  
8 decided I'm moving out of the '70s and want to get progressive,  
9 so I sell to my law clerk my iPod with all my favorite Bee Gees  
10 songs.

11 MR. MANDEL: That's fine, because you transferred the  
12 material object in which the copies are affixed, and that would  
13 be a first sale. And you're not making another copy, you're  
14 giving them -- your iPod happens to be preloaded with sound  
15 recordings, and that's fine.

16 THE COURT: But now I'm more technically advanced, so  
17 I have it actually stored in a cloud that allows me to listen  
18 to the same great numbers through just through different  
19 technology, but you're saying I can't transfer any of those  
20 wonderful songs to her.

21 MR. MANDEL: That's correct, and that's the statutory  
22 scheme. And it's really because the first sale doctrine is  
23 based on the notion of the actual copy, you can't make a  
24 reproduction.

25 THE COURT: And that's a statutory language question,

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1 or is it a licensing contractual question?

2 MR. MANDEL: It's interpretation. We cite to the  
3 Copyright Office Report of 2001, which we think has some very  
4 interesting discussion of this whole issue. And if you look at  
5 the origins, it set out a very clear distinction between  
6 reproduction and distribution, and the idea was there's a  
7 recognition that physical property, that you have a right  
8 generally to dispose of that, but not to reproduce it and  
9 dispose of a copy.

10 And so it's not just a technical distinction, it is a  
11 distinction on which the entire doctrine turns. And basically,  
12 what we're saying about the reproduction is you can't stand  
13 there and pretend that the reproduction is just about space  
14 shifting if the whole purpose that you're encouraging and the  
15 whole business model that you developed is focused on idea of  
16 selling that recording.

17 THE COURT: But what if I stored it in the cloud when  
18 I still liked Bee Gee's and decided to sell it later when I  
19 decided I don't and I want to recoup some of the investment,  
20 you're saying that's violation?

21 MR. MANDEL: And their technology talks about actually  
22 checking something that makes it available for resale, so I  
23 think users have the opportunity to actually use their  
24 technology, decide when they're offering it for resale. And  
25 we're saying certainly the point that you do that, you can't

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1 really say anymore it's just about storage because what you're  
2 doing is you're distributing it.

3 THE COURT: But it was about storage at the time I  
4 copied it into the cloud, right? It is a hypothetical.

5 MR. MANDEL: Hypothetically it could have been about  
6 that, but if you look at the business model --

7 THE COURT: This is -- indulge me on my hypothetical.  
8 Are you saying the outcome is different in if I chose to store  
9 these things, in fact did store them for my own use for a year,  
10 and after a year I decided to move to a new decade and sell my  
11 collection?

12 MR. MANDEL: I think it is different, and the reason  
13 it's different is maybe it will be the case that Congress will  
14 decide that there's enough reliability in the technology that  
15 they have developed and that others may develop that they're  
16 willing to extend the first sale doctrine in a way that it can  
17 apply in this digital environment and someone can have a  
18 broader right to distribute it, but it's not there now.

19 THE COURT: So that's my point. My point is you're  
20 saying the statutory language is where I ought to go and where  
21 I ought to stop, because the statutory language would prohibit  
22 what going is on here, even though if I had the CDs or the  
23 iPod, I could go to the flea market and sell the darn thing.

24 MR. MANDEL: That's right. We say the statutory  
25 language, but also the history of the first sale, it's the



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1 clear interpretation of first sale that says that you can't  
2 make a copy in the context of first sale. All those things  
3 together, which the copyright office was looking when they  
4 opined on the question, all together saying to us maybe someday  
5 maybe there should be a new digital right. They haven't done  
6 that now, and under existing law there is certainly not that  
7 right.

8 THE COURT: What about your response to the opposition  
9 brief which talks about pointers, sometimes like in some ways  
10 the language being utilized in the technology being described  
11 to differ between the parties so they're almost talking past  
12 each other, so talking about a pointer, we're not copying,  
13 we're allowing somebody else to, in essence, have the click  
14 rights to something that is in the cloud?

15 MR. MANDEL: I think once again what they try do is  
16 break this process down and then OK, pointer, so there's no  
17 copying made, so it's just space shifting here, just space  
18 shifting here. But as we said in our reply papers, it shifted  
19 from one user to another.

20 THE COURT: But that happens in flea markets all the  
21 time, and that's a time honored right. But if we're  
22 interpreting a statute that predates the technology, why would  
23 we interpret it in such a way as to prevent the first purchaser  
24 from ever being able to have rights in that or the ability to  
25 resell it? Why would we take that away if we have two choices,

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1 you get to make a sale like a flea market owner or --

2 MR. MANDEL: I think in the first instance we would  
3 say that decision would be for Congress to make. I think the  
4 Copyright Office went on after, it said there is no digital  
5 first sale, it then analyzed should the Copyright Act be  
6 amended to provide. They decided -- their determination was  
7 no, it shouldn't be. But ultimately whether it should or  
8 shouldn't be is a congressional question. We say it doesn't  
9 satisfy it right now, and right now I think that's a function  
10 of the statutory language and history.

11 THE COURT: I have the statute right here in front of  
12 me. What provision are you referring to?

13 MR. MANDEL: Section 109.

14 THE COURT: What part of it?

15 MR. MANDEL: 109(a), I believe it is, talks about the  
16 right to -- let me take the statute.

17 Notwithstanding the provisions of 106(3), the owner of  
18 a particular copy or phonorecord lawfully made under this title  
19 is entitled, without the authority of the copyright owner, to  
20 sell or otherwise dispose of the possession of that copy or  
21 phonorecord.

22 So the whole idea of first sale I think is borne out  
23 in all the cases that interpreted it, as well as that it's the  
24 particular material object, and the example that your Honor  
25 gave is really a good example that illustrated that. If you

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1 have the iPod and you distribute the iPod the recordings are  
2 on, then you have distributed that particular copy.

3 If you make a copy and then put it up somewhere else  
4 in order to distribute it, it isn't that particular copy  
5 anymore that you're distributing. And that is basically the  
6 whole essence of the first sale doctrine is that it didn't  
7 include the right to reproduction any more than if I had a book  
8 or CD that I could photocopy, give the copy to my friend, and  
9 then decide I don't want this book anymore, I'm going to throw  
10 the book in the garbage. That wouldn't be covered by the first  
11 sale doctrine, and neither is this. It's logically no  
12 different.

13 THE COURT: But in terms on definition of copies, 101,  
14 copies are material objects.

15 MR. MANDEL: It turns on the definition of copies and  
16 the notion of that particular copy, because what 109 is really  
17 saying is that you have a right to dispose of the particular  
18 copy if lawfully made.

19 And that's another issue. We don't think it's  
20 lawfully made because if the copy was made for the purpose of  
21 distributing it, it's not lawfully made. You don't have a  
22 right to make a copy and distribute it to somebody else. So  
23 that's another problem under 109, and I think they try to  
24 confuse this. And I understand the hypotheticals are  
25 interesting in terms of if I store it today and a year from now

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1 I sell it, but the real marketplace model as presented and  
2 promoted as going to make them money is not by a kind of  
3 differentiation, it's about: Hey, sell your digital music.  
4 It's happening essentially together. And that there may be  
5 some people that decide to store it there and not sell, that's  
6 not what the business model is about. That's what  
7 distinguishes them from any other places where they could store  
8 them. What distinguishes them is they're telling people you  
9 should sell it because you could put it up there, you earn  
10 credits to distribute it, you can sell it to somebody else.  
11 And that's their business model, and it turns on reproduction,  
12 which is not allowed under the cases and statute.

13 And also it's not a lawfully made copy because it's  
14 not lawfully made. If it's for purposes of distribution, you  
15 don't have a right to copy a copyrighted work to distribute it  
16 to somebody else, even if you decided to throw away your work.  
17 That's my example with the book. I could photocopy my book. I  
18 can't give the photocopy to my friend even if I throw my book  
19 in the garbage. And functionally, it may seem like I should be  
20 able to do that.

21 THE COURT: You can give the book.

22 MR. MANDEL: I could give the book.

23 THE COURT: And you could sell the book.

24 MR. MANDEL: I could sell the book.

25 THE COURT: Basically you're saying the technology

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1 created a real great windfall to publishers because they get to  
2 shut down secondary markets that previously existed before  
3 technology, right?

4 MR. MANDEL: I don't think so, because I think if  
5 you're going to get into the policy question, which I'm kind of  
6 avoiding because what I'm saying is the statute speaks to this,  
7 it's Congress's province to make those judgments. But if you  
8 want to look at the policy point of view, there is enormous  
9 risk that the copyright owner is being subjected to here. The  
10 fact that it's the lead-in for my computer, what assurance do I  
11 have that before I have done that I haven't downloaded it onto  
12 some other device, that I don't reconnect that computer and I  
13 listen to -- continue to listen to the music?

14 THE COURT: But that aside, there's always been a  
15 desire, frankly, to shoot down the swap meets and shut down the  
16 secondary markets for CDs and records.

17 MR. MANDEL: Because oftentimes that marketplace is  
18 selling infringing copies and there's illegal bootleg copies.  
19 Nobody is saying we want to shut down the right to an album,  
20 legitimate CD that I purchased to resell, but not to make  
21 copies and distribute en masse copies it. That is something  
22 that is a concern to the record company.

23 THE COURT: So you're OK with people selling their old  
24 records and selling their old CDs?

25 MR. MANDEL: Absolutely.

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1 THE COURT: So if somebody like defendants come up  
2 with a way to really verify that the copy has been deleted, you  
3 would be OK with telling Congress, sure, we think that  
4 previously owned, preowned digital audio files should be able  
5 to be sold?

6 MR. MANDEL: I can't speak to what my client would say  
7 in that legislative discussion.

8 THE COURT: I would be willing to take a hunch.

9 MR. MANDEL: But my point is they shouldn't have to  
10 take that gamble because, first of all, if the technology is  
11 proven to that extent, then Congress can enact that protection.  
12 We have a real question, because even Mr. Ossenmacher agrees in  
13 The Times article if people want to get around it, they will  
14 get around it. That's obvious you can do that, you just  
15 download it to a different device not synced to the computer,  
16 and bingo, you have got around it.

17 So it's cold comfort to say to my client, don't worry,  
18 this is all going to work great and nothing is going to happen,  
19 because we know that there's a long history here where people  
20 want to infringe. We have seen a lot of case law, *Napster* and  
21 all these cases that have come up going to Supreme Court.  
22 There's a lot of effort to sell infringing copies, and asking  
23 my client against that backdrop and decades of litigation and  
24 experience to take it at face value that people are going to do  
25 the right thing, I don't think that's something that they have

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1 to do, and certainly not something Congress said they have to  
2 do. If Congress makes that judgment, fine, but they haven't  
3 made that judgment yet.

4 THE COURT: But yours is a legal argument, and it's  
5 not a licensing of contract argument, it's a statutory  
6 interpretation argument.

7 MR. MANDEL: I believe that's correct.

8 THE COURT: So it doesn't turn on whether or not the  
9 conditions of buying the audio file were such that the seller  
10 made the buyer promise they won't resell.

11 MR. MANDEL: I don't think that's really critical to  
12 it, no.

13 And should I move on to the essential step doctrine?

14 THE COURT: Yeah, let's do that, too.

15 MR. MANDEL: So in terms of fair use, I want to say --  
16 I won't go through it, but if you look at the four factors,  
17 which they haven't briefed, all they cited is a case under the  
18 digital recording act, not even a fair use case involving the  
19 MP3 case, and they haven't gone through the four factors.

20 We think the cases that looked, like the *MP3.com* and  
21 *Napster* decision, when they analyzed fair use in the context of  
22 what is really going on is basically copying to be able to  
23 distribute digital files, they have really given this defense  
24 short thrift, and we don't think it works here by pretending  
25 the service is something other than what it is and redefining

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1 it into component parts. And fair use is an equitable  
2 doctrine, it's a rule of reason. It would be the wrong  
3 approach for the Court to close its eyes to the reality of what  
4 is taking place and do this kind of formalistic dissection  
5 without really looking at the end result, so we think fair use  
6 is not even colorable here.

7 In terms of the essential step, which is really the  
8 other step that they assert in terms of reproduction, basically  
9 in the first instance we don't even think this is a computer  
10 program under the statutory definition, a set of instructions  
11 to carry out a result. But even if it is, the case law that we  
12 cited is very clear that 117 of the Copyright Act is all about  
13 internal use, and the statutory language there says for no  
14 other purpose, it has to be essential to the use and for no  
15 other purpose.

16 And the purpose here again is to make a distribution,  
17 to be able to transmit to to somebody else. That's the  
18 quintessential example of what you can't do under 117. Because  
19 117 is a limited exception that recognizes when you buy a piece  
20 of software, in order to use it, you have to technically make a  
21 copy. When I put it in my computer, by definition a copy is  
22 made into my hard drive, if it didn't do that, I couldn't use  
23 the program.

24 That really has no bearing on what is going on here,  
25 where it's not essential to make the copy to use it, it's only



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1 essential if you want to distribute it to somebody else, which  
2 you have no legal right to do. So the essential step under all  
3 the cases that we cited clearly doesn't fall into protecting  
4 this kind of use, and I don't believe they even cited a case to  
5 the contrary.

6 So really the defenses I think are really weak on the  
7 law. When you really look at the case law, they have basically  
8 nothing. They're arguing a lot of policy but neither fair use  
9 or essential step work here, and in the end, what we're left  
10 with is that they are wishing that there were a right to do  
11 something that they don't have a right to do under the law.

12 THE COURT: All right. But for essential step, I mean  
13 you just conceded, I think, that making a copy is necessary to  
14 be able to access and listen to the audio file you purchased,  
15 right?

16 MR. MANDEL: Yes.

17 THE COURT: So if you have -- I have twins girls, if  
18 one of them buys the Bee Gees and the other buys the Beatles  
19 and says great, we'll share, we have got one computer, we'll  
20 just share and each listen to the other's purchased files, is  
21 that a violation then of the copyright law?

22 MR. MANDEL: No, because it's the same computer and  
23 they have each downloaded a particular file that they're  
24 listening to. You can play anything that you want on your  
25 computer. The language of 117 says it's essential to the use

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1 and for no other purpose, and the case law is very clear when  
2 it talks about "for no other purpose" is for internal use, not  
3 for an ability to make distributions.

4 THE COURT: But if the enterprising one to says the  
5 lazy one, "I will charge you five bucks and you can listen to  
6 the Bee Gees," is she all the sudden going to show up in a  
7 copyright case?

8 MR. MANDEL: I think there's a lot of hypothetical  
9 examples, but what is going on, the marketplace reality is  
10 about setting up a mechanism by which people can sell to anyone  
11 out there in the world. And I don't think we're concerned  
12 about your sister or anything like that. And in that case, I  
13 don't think that anybody is transmitting it to another computer  
14 anyway, if they're using the same computer.

15 So the real question is when you set up a business  
16 model that is based on distribution and reproduction, how does  
17 that fall within 117? And it clearly doesn't. And we don't  
18 think it's a computer program, but if it is under the case law,  
19 it is clear under the statutory language that it is not  
20 protected by the essential step doctrine.

21 I don't know if you want me to move on to other than  
22 reproduction. We have kind of talked about distribution.

23 THE COURT: Covers the arts, that sort of thing?

24 MR. MANDEL: I meant distribution I think we have  
25 already touched upon, so we have talked about reproduction and

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1 distribution.

2           The only point I want to make on distribution that we  
3 didn't cover, we talked about the defense of first sale, but  
4 didn't talk about the question of whether it's actually a  
5 distribution. They seem to say well, it's not a distribution  
6 because you're not distributing copies. And we think if you  
7 look at the precedents, basically they made clear courts have  
8 not hesitated to say when you transmit electronic files that is  
9 a distribution. In fact, the Supreme Court in *Tasini* said the  
10 sale of copyrighted articles through LexisNexis is a  
11 distribution.

12           And as practical matter, if you look at the  
13 consequences of that, it would be devastating, it would be open  
14 season on copyrighted works if you essentially were saying put  
15 it up on the internet, transmit to anyone you want, you're not  
16 distributing. That can't be right, and courts had no trouble  
17 saying that's not right, there is a violation of distribution  
18 right under the precedents.

19           What they try and say is well, if there's a violation  
20 of distribution rights, there must be a first sale defense.  
21 But that's not the case, because the point is the first sale  
22 talks about that particular copy, and that material object is  
23 not what is being sold, there's a reproduction there.

24           THE COURT: That's your point about material versus a  
25 non-material copy.

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1 MR. MANDEL: Correct. And I don't know if you want me  
2 to briefly address performance and display as well.

3 THE COURT: I think I get it from the papers.

4 MR. MANDEL: I don't think that I need to say much  
5 more. I think I said in my reply papers, again, the cases talk  
6 very clearly about streaming clips to people who are interested  
7 purchasers. That's what their tutorial says on the Web site  
8 they do. That is not the same as going to my locker and  
9 stream. That would not be a public performance, and we didn't  
10 challenge that. So again, we're talking at cross purposes.  
11 We're not addressing the same thing.

12 THE COURT: So a link you have no trouble with.

13 MR. MANDEL: I think what I'm saying is that the  
14 individual person in their locker who may own a file we are not  
15 challenging their right to play it, but what we're saying is  
16 when you stream to interested purchasers anything in these  
17 clips for the purpose of enticing them to make a purchase  
18 that's not legally authorized in the first place, that is a  
19 violation. That is a public performance.

20 THE COURT: All right. But again, let's get back to  
21 my analogue world of my Bee Gees recordings CD. If I went a  
22 flea market and allowed people to listen to my recording, CD,  
23 before purchasing, is that a violation? Is that a performance?

24 MR. MANDEL: Is that a public performance? That might  
25 be if you're playing it in a public setting.

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1 THE COURT: I have a CD player right there with a set  
2 of headphones to listen to see if it's damaged or not damaged  
3 or see if the --

4 MR. MANDEL: It's certainly not what is going on in  
5 this case, I think.

6 THE COURT: But why not? It seems to me that to  
7 perform a work means to recite, render, play, dance or act it,  
8 directly or by means of any device or process.

9 MR. MANDEL: It may be that that's a public  
10 performance, and maybe we could get into an argument whether  
11 that's a fair use purpose of legitimate sale. The truth is,  
12 here it's not.

13 THE COURT: Here it would be furtherance of a sale.

14 MR. MANDEL: Not an authorized sale for all the  
15 reasons we already discussed.

16 THE COURT: So it comes back to, I think, your  
17 interpretation of the Copyright Act and --

18 MR. MANDEL: It's connected to that. And I think they  
19 rely on a license that says that you can't use their clips for  
20 purposes of encouraging infringement, which is exactly what we  
21 say is going on here because they're doing it to interest  
22 people and make purchases that are not legally permitted.

23 The last point to round out liability, just to briefly  
24 mention the DMCA, I think they make a half-hearted defense  
25 here, but they don't even really say that they fall under the

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1 requirements of the statute, they just say our notice was  
2 defective. Of course, there's no requirement that you even  
3 give a notice, so it's kind of -- I don't understand their  
4 argument.

5           There are three things they're required to show that.  
6 They haven't attempted to show that they can satisfy all three  
7 of those things to claim a DMCA immunity. And clearly and most  
8 directly, they can't establish that they don't have a right and  
9 ability to control, and that they don't profit from the  
10 infringing activity because they take a piece of every sale.  
11 That's a direct financial benefit. And they said they have a  
12 right and ability to control, because that's the whole purpose  
13 of their verification engine is to decide prescreen whether it  
14 will be offered or not.

15           The problem with their verification is it's based on  
16 an erroneous legal principal that seems to assume they're  
17 entitled to make a distribution they're not entitled to make,  
18 but they clearly have the ability to control it, by their own  
19 admission, and clearly financially benefit. And perhaps for  
20 that reason they haven't even argued that they fall within the  
21 DMCA immunity in their papers, and they don't under the clear  
22 language of the statute.

23           So that's all I have to say on likelihood of success  
24 on merits.

25           THE COURT: OK. Mr. Beckerman.

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1 MR. BECKERMAN: Your Honor, could I start off by  
2 addressing a hypothetical? Because I want to make sure that  
3 the hypothetical that you asked Mr. Mandel --

4 THE COURT: I don't know why she likes the Bee Gees,  
5 she just likes them. Why do you like them so much?

6 MR. BECKERMAN: The hypothetical that your Honor  
7 addressed to Mr. Mandel about in the flea market letting people  
8 listen to it. That can't go on. No one can listen to what's  
9 in the cloud locker except the user, and it would have to --

10 THE COURT: But you indicated it's a link to some  
11 other authorized site.

12 MR. BECKERMAN: There are links to the download site  
13 with the 30 second clips like they have on iTunes where you  
14 sample it.

15 THE COURT: But who authorized it?

16 MR. BECKERMAN: Well, this is licensed by Ridio, and  
17 Ridio is a licensee of plaintiff. And we don't stream anything  
18 there, we just have the links to audio under our license with  
19 Ridio. Similarly, the artwork is just links that are provided  
20 by Ridio pursuant to the license agreement pursuant to their  
21 agreement with plaintiff.

22 So I just want to make that clear that that's the only  
23 public streaming that goes on, and it's pursuant to license.  
24 And it's not on the site at all.

25 THE COURT: It's not on the site. It's not in the

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1 cloud, you mean?

2 MR. BECKERMAN: It's not on the ReDigi cloud at all,  
3 it's just linked.

4 THE COURT: I understand that from the papers, which  
5 is why I think that's kind of beside the point. Did you not  
6 understand that, Mr. Mandel, or was that your understanding as  
7 well?

8 MR. MANDEL: That's my understanding of what they have  
9 said.

10 THE COURT: You're not sure it's true.

11 MR. BECKERMAN: It wasn't clear to me why Mr. Mandel  
12 keeps talking about fair use and essential step, because we  
13 only recognized those in connection with the upload and  
14 downloading of the storage locker, which he doesn't challenge.  
15 He's only challenging the -- we never said the fair use  
16 doctrine or the essential step defense has any bearing on the  
17 used digital marketplace. The used digital marketplace is  
18 completely lawful for completely other reasons. It doesn't  
19 involve any kind of copying.

20 THE COURT: Well, let me stop you there. What you're  
21 saying is there's copying done to get the audio file in the  
22 cloud, but there's no copying after that.

23 MR. BECKERMAN: No copying on the site at all. The  
24 upload and the download --

25 THE COURT: I'm not sure that's a distinction that



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1 necessarily matters, no copying on the site, but if you're  
2 enabling or assisting someone else in copying someplace else,  
3 then you could be held liable for the infringement, right? At  
4 least conceivably.

5 MR. BECKERMAN: I will just concede the uploading and  
6 downloading is copying, but arguably it's not even a copy under  
7 *Cartoon Network*, but I won't -- I'm not making that point.

8 THE COURT: But just so I'm clear, because in using  
9 Bee Gee's analogies, my technology may be as dated as my  
10 musical tastes, but you're conceding copying is necessary to  
11 upload into the cloud and copying is also necessary for the  
12 purchaser to listen, right?

13 MR. BECKERMAN: For the purchaser, the purchaser after  
14 he purchased it?

15 THE COURT: Yeah. Is there a copying that is  
16 necessary after that or not?

17 MR. BECKERMAN: There will be a copy in RAM, no doubt.

18 THE COURT: OK.

19 MR. BECKERMAN: But the actual sale transaction  
20 involves no copying. And Mr. Mandel has falsely stated --  
21 well, the papers falsely allege in a number of places that  
22 there are copies floating around on the site, which is  
23 completely false. And the sale is effective without any  
24 copying whatsoever, it's just a change in the record locator.  
25 And there are various grounds, neither of which is fair use or

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1 essential step, for a finding that to be lawful. The Court  
2 could find it on alternative grounds, either that under the  
3 distribution section, 106, the MP3 files are not material  
4 objects, as plaintiffs themselves concede in their papers, or  
5 your Honor could say well, even if they were material objects,  
6 well, the definition is exactly the same for the first sale  
7 exception.

8 So in this particular case I don't even need to decide  
9 the material objects in question, because in this particular  
10 case I have a very clear application of the first sale  
11 doctrine, because this particular copy has changed ownership  
12 without any reproductions being made. So it clearly fits  
13 within the first sale doctrine.

14 THE COURT: Well, I mean I think what you're arguing  
15 is it's sort of a tandem application of essential step and fair  
16 use, right?

17 MR. BECKERMAN: No, they have nothing to do with the  
18 sale.

19 THE COURT: Well, the copying is necessary to get into  
20 the cloud all together, right, and so what Mr. Mandel is saying  
21 as long as it's for one's own personal use, that's OK, but if  
22 it's going really for the purpose of a distribution, that's not  
23 OK.

24 MR. BECKERMAN: Well, purposes are going to be  
25 individual to every person. Like with the Bee Gees, you decide

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1 you wanted to move into the modern age, you put them there, you  
2 were thinking you don't want these cluttering up your computer  
3 any more, you played a few just for the heck of it to see if it  
4 works and say, you know, you maybe I acted too hasty, and you  
5 store them there for a year and then you decided to take them  
6 back. Mr. Mandel is trying to ask you to disregard what  
7 actually happens. The actual physical event that is occurring,  
8 he's asking you to avoid -- to pay no attention to that  
9 technology, disregard that.

10 THE COURT: I think there may be a dispute to what the  
11 technology is, which I think is foreshadowing what we're going  
12 to be talking about with your contemplated motion for summary  
13 judgment, because maybe there's some factual disputes that have  
14 to be resolved first.

15 MR. BECKERMAN: There has to be some evidence on this  
16 side and some evidence on that side. There can't be some  
17 evidence on this side and some lawyer speculating as to what he  
18 thinks may be going on.

19 THE COURT: We haven't had any discovery, so there's  
20 no evidence on any side at this point.

21 MR. BECKERMAN: He should not have brought a lawsuit  
22 without evidence of a copyright infringement. If there were a  
23 copyright infringement, it would have been a small matter for  
24 an investigator to open up an account -- and this is what they  
25 do all the time, in fact they probably did. I think it is

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1 interesting they made a preliminary injunction motion and there  
2 was no investigation. But maybe there was a investigator and  
3 they didn't like the information he brought back to them. How  
4 could you bring a lawsuit without an investigator?

5 If the investigator could show that some law was being  
6 violated, that a copy was being made, contrary to what we said,  
7 if he could show there is public performance or if he could  
8 show there was unlawful copies littering the place -- the  
9 likely claim is it is completely fabricated by the attorneys --  
10 where is that evidence? There has to be some threshold for  
11 bringing a lawsuit instead of terrorizing people in the first  
12 place.

13 THE COURT: I think we're getting ahead of ourselves  
14 here. I was suggesting that the summary judgment motion seems  
15 to be premature because we have had no discovery at all, and at  
16 this stage of a case, nobody is expected to be basically  
17 attaching affidavits and asking the Court to resolve disputed  
18 issues of fact.

19 MR. BECKERMAN: I have a very strict policy, if Court  
20 tells me a motion is premature, I don't make it.

21 THE COURT: But right now we're talking about the  
22 preliminary injunction motion, and it seems to me what  
23 Mr. Mandel is saying is that there is a copying, and it's  
24 copying for the purpose of a sale. And you're suggesting there  
25 is a copying, but it's a necessary first step for the purchaser

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1 to listen, but the sale itself doesn't involve any copying.  
2 That's really what -- I think each of is characterizing what  
3 goes on here slightly differently. It also happens to coincide  
4 with legal theories, not surprisingly, perhaps.

5 But what Mr. Mandel said a moment ago is if you had a  
6 book and you made copies in the book for your own use, that  
7 would be one thing, but if you sold the photocopies of the book  
8 to somebody else, that would be an infringement. Do you agree  
9 with that?

10 MR. BECKERMAN: If you sold copies of the book, that  
11 would be an infringement.

12 THE COURT: Right. So I think it's --

13 MR. BECKERMAN: I wasn't sure if it's OK to make --

14 THE COURT: I said it's a matter of which analogy one  
15 chooses for this different and unique technology.

16 MR. BECKERMAN: We're not selling a copy of the file,  
17 we're selling the actual file.

18 THE COURT: I think what you're suggesting is you're  
19 selling access to a file, right, that's in a cloud, and the  
20 process of putting it in the cloud is an essential step for the  
21 user. The first user and the process of accessing it in the  
22 cloud, which might entail a copy, is a necessary step for the  
23 purchaser to listen, but they're essential. Is that really  
24 what you're arguing?

25 MR. BECKERMAN: We don't access a separate thing, we

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1 sell title. One of the reasons that we started out this  
2 business model with iTunes is because iTunes sells the title to  
3 the MP3.

4 THE COURT: But if I had a whole bunch of books in my  
5 library and I decided who needs this, I could hang stuff on my  
6 walls if I didn't have these book cases, so I'm going digitize  
7 every book in my library and I could put it in the cloud, are  
8 you suggesting that I could never sell those books, the digital  
9 versions of those books to someone else?

10 MR. BECKERMAN: No.

11 THE COURT: No? Why not? What's the difference?

12 MR. BECKERMAN: Well, in this case, we have gone --  
13 we're doing something which is lawful and which they don't  
14 challenge, which is enable people to store it.

15 Secondly, we have --

16 THE COURT: But can I interrupt you? Are you  
17 suggesting that the first step of digitizing my books and  
18 storing in a cloud would in of itself be a violation of  
19 Copyright Act, for my own use?

20 MR. BECKERMAN: I'm not aware of a precedent for it,  
21 but I would imagine it would probably be a fair use just like  
22 the fair use of an MP3 file.

23 THE COURT: But you're suggesting selling it from the  
24 cloud would be an infringement, right?

25 MR. BECKERMAN: Well, you still have the book in your

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1 book case.

2 THE COURT: I have got rid of all the books.

3 MR. BECKERMAN: Well, a ReDigi user --

4 THE COURT: I had a bonfire.

5 MR. BECKERMAN: Well, you had it.

6 THE COURT: I had digitized all my books, put them in  
7 my cloud, and then burned all my books and put up paneling so I  
8 didn't need the book cases. Are you saying -- you're not  
9 disputing that I could go look at my digital books without  
10 violating the Copyright Act, right? You're saying I can do  
11 that? You think about that.

12 Mr. Mandel, can I do that?

13 MR. MANDEL: No.

14 THE COURT: You're saying I can't do that. But I  
15 could make photocopies and leave them -- I could make a copy of  
16 the chapters or things that I want to use for my term paper.

17 MR. MANDEL: I don't think there's a case that  
18 actually addressed it. I think you would have to look  
19 factually at each situation. Arguably it would be a fair use  
20 if you were making the copies for your own personal use.

21 THE COURT: Yeah, my own personal use.

22 Do you know what real estate costs in Manhattan? I  
23 don't want books all over the place.

24 MR. MANDEL: I think the problem here -- I don't think  
25 we actually do have a factual dispute. Their papers

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1 acknowledge that a copy is made. What I really don't  
2 understand is there is no copying in the resale, but you  
3 couldn't have a resale without the copy. That's the point.  
4 There would be no marketplace. There would be no possible  
5 resale but for the copy, because you wouldn't be able to take  
6 the pointer and point it from A to B. So it seems to me to be  
7 a very formalistic and not appropriate way to look at it,  
8 particularly where you've gone out and marketed your whole  
9 service as being based on a marketplace, that's how you make  
10 your money, you take a cut of sales.

11 Now for legal purposes, we're saying it's just  
12 storage, I'm just storing it, and there's no copying. Well, if  
13 there's no copying, you wouldn't be able to have a marketplace.  
14 Of course there's copying. We don't think fair use or any of  
15 these defenses you can look at in that kind of isolated way  
16 where you don't actually look at what is happening.

17 On these facts before the Court, based on what  
18 defendant has done and how the marketplace is set up, how it's  
19 trying to make money, clearly the copying is being done for an  
20 improper purpose. And they're trying to kind of put themselves  
21 in some other clothing because maybe that would be a fair use,  
22 but that's not what we have here.

23 THE COURT: I'm curious about the consistent  
24 application of law in different hypotheticals. It's certainly  
25 instructive for me. So I know you don't want to indulge me in



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1 these, but it seems to me if a pure storage cloud marketed  
2 itself for that purpose to a user who has got scads of digital  
3 recordings, then that user were to try and they bequeath their  
4 access to their files to somebody else, could they do that?

5 MR. MANDEL: I don't know. I would have to think  
6 about that.

7 THE COURT: Well, we're on Mr. Beckerman's time now  
8 anyway, so I wanted to give him a chance to think about my  
9 hypothetical.

10 MR. BECKERMAN: I'm not a hundred percent sure that  
11 digitization of a book is -- I don't know that it's not a  
12 violation of reproduction right. I really am just not up to  
13 speed on that issue.

14 THE COURT: OK.

15 MR. BECKERMAN: I don't know. The difference between  
16 a book and these iTunes files is that each iTunes file has very  
17 specific unique identifier. So even if a million different  
18 copies are bought of the same song, every single unique file  
19 has an a different identifier; it has a different purchase  
20 date, it has a different purchaser, and it has the UITS, in the  
21 later versions of it, which is a unique encrypted code, which  
22 is going to be different for every single one. So there is  
23 only -- there can only be one of that unique file.

24 There can be multiple instances of it with unlawful  
25 copying or even with lawful copying, but we have gone the extra

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1 mile by having software which searches your computer and any  
2 attached devices and any devices which come later at any future  
3 time, all which have are designed to prevent you from having  
4 any additional copies of that file. I think it's doing a  
5 tremendous service to the recording industry because it's  
6 telling people that have related copies that's not the same.  
7 They might think it's the same, but it's not the same because  
8 they can't resell it. Whereas, this can be resold, it has a  
9 market value.

10 THE COURT: I think I understand that point.

11 Did you want to respond to any other points of  
12 Mr. Mandel?

13 MR. MANDEL: If I could briefly.

14 THE COURT: I'm asking Mr. Beckerman if he wants to  
15 respond to points you made.

16 MR. BECKERMAN: He's talking about us making  
17 half-hearted defenses. The thing is, we had 20 pages and we  
18 had about six and a half days to put it all together. I could  
19 write a brief on this. It seems to me, to all us of us,  
20 sophisticated lawyers, that this was an obvious DMCA case. But  
21 we chose to emphasize the things that say this isn't legal. If  
22 they had given a proper DMCA notice --

23 So Mr. Mandel, shoot me, I'm sorry, but --

24 THE COURT: Don't do that, that would be illegal, I  
25 could tell you. As a former criminal lawyer, I know.

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1 MR. BECKERMAN: As far as essential step and fair use,  
2 Mr. Mandel says we are using fair use as a defense on  
3 distribution, which we didn't, as opposed to spending more time  
4 in our brief on these subjects. Why should we? Their own  
5 lawyer stood up before the United States Supreme Court and says  
6 space shifting is OK. Why should I make a big deal? Why  
7 should I analyze all the factors?

8 THE COURT: Because I think the issue -- well,  
9 Mr. Mandel can respond to his own --

10 MR. BECKERMAN: I am speaking to an incredibly hot  
11 bench, so I don't feel I need to go repeat everything in my  
12 papers.

13 THE COURT: Hot I think is sort of -- warm, warm and  
14 inviting, like a nice bath.

15 MR. BECKERMAN: If your Honor has any questions, I  
16 have nothing further.

17 THE COURT: I may have some other questions after  
18 hearing from Mr. Mandel.

19 Did you want to respond?

20 MR. MANDEL: Briefly. First of all, I want to clarify  
21 in terms of there being a violation, we did put in evidence in  
22 the declaration. We attached an exhibit of the recordings that  
23 we found on the ReDigi site offered for sale. We did ourselves  
24 download and verify they were our recordings. I didn't think  
25 what was what the dispute was about.

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1           They set up their marketplace to be able to sell  
2 lawfully purchased copies. I don't understand them to be  
3 disputing that Capitol's recordings have been made available  
4 and have been offered for sale. And in fact they have been.  
5 As we said in our papers, we gave a hundred -- more than a  
6 hundred examples of our recording that we own copyrights for  
7 that were up there in the cloud that are available for sale.  
8 And in fact our people -- Capitol downloaded them and verified  
9 they were the song. They didn't come back -- and they say they  
10 have all these recordings, they didn't say that wasn't Capitol  
11 recordings, we never had Capitol's recordings up there. I  
12 don't think there's a serious -- they say there's no proof of a  
13 violation, but that's a very clear. The issue is a legal  
14 issue.

15           And I understand the hypotheticals are very  
16 interesting, and we have been doing it ourselves all week, and  
17 they're hard, and they're informative, and I do appreciate why  
18 the Court is doing it and pushing us. But at the end of the  
19 day, I do want to return to what really is at issue here,  
20 because that's ultimately what we're deciding. And I just  
21 return to the same thing, you can't set up a business model  
22 that is effectively going to make money from distribution of  
23 digital files which could not take place without a  
24 reproduction -- by their own admission, there's a necessary  
25 step in order to do that -- and then turn around and defend it

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1 by some well, you know that's just space shifting, even though  
2 we assume that most of what takes place on the site is sales.  
3 That's what they're in business to do, that's what they're  
4 doing to make money. That's what they advertised. Yes, there  
5 may be an isolated case of someone who decides to store up  
6 there and doesn't do anything, but that's not what they're in  
7 business for. That's not what most people are going to do.

8 In fact, what should be enjoined is the sale, and it  
9 seems like they have the mechanism because their own system  
10 says you have to click a button to offer it for sale. Well, as  
11 far as Capitol is concerned, with respect to its recordings,  
12 that button should not be available. People should not be able  
13 to go up in the cloud and click a button and say I'm selling  
14 stuff that they don't have a right to sell that they reproduce.

15 So from our perspective, while the hypotheticals are  
16 interesting, while the technology may be new, the principles  
17 are pretty clear, and we think it's a pretty clear violation in  
18 terms of summary judgment. I don't think there's going to be  
19 many factually disputed issues. Obviously, we think there's a  
20 likelihood of success on the merits. By definition, summary  
21 judgment is going to be inappropriate for the defendant.

22 THE COURT: I guess the other factors which I think  
23 you touched on, Mr. Mandel, with respect to a preliminary  
24 injunction or balancing of the equities and public interest, so  
25 I think you've hit each of those. If you wanted to elaborate

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1 in any way, I will give you a minute.

2 MR. MANDEL: I will say briefly I think with balance  
3 of hardships we cited a couple of cases, particularly in our  
4 reply brief, that I think are worth taking a look at. One of  
5 them quotes a Southern District case where they're talking  
6 about balance of hardships. We're not going to worry about the  
7 hardship when you're engaging in an activity that you shouldn't  
8 have been doing in the first place and roll out in testing mode  
9 a service that basically is based on something that cannot be  
10 justified under existing law. You have taken your risk and  
11 that is something that you should have to bear the risk on.  
12 You can't turn around and say it can be a real hardship.

13 In terms of public interest, we say the public  
14 interest in upholding the statutory scheme that has clearly  
15 defined principles for what is and isn't appropriate is  
16 obviously served by an injunction.

17 THE COURT: Mr. Beckerman, do you want to respond?

18 MR. BECKERMAN: Well --

19 THE COURT: Those two, the balance of equities and the  
20 public interest.

21 MR. BECKERMAN: It's obvious that this is not about  
22 public interest on Mr. Mandel's part, it's about the private  
23 interest of the corporation. And it's very obvious that the  
24 public is better off with competition, with new companies  
25 developing, new technologies, and relying on old principals of

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1 law and working hard to avoid copyright infringement and to  
2 prevent copyright infringement to make sure their site can't be  
3 used for infringement.

4 THE COURT: Or that whose site can't be?

5 MR. BECKERMAN: ReDigi's site cannot be used for  
6 copyright infringement. Their software on the client  
7 application. There is software on the server. All of these  
8 are meant to create a one-to-one relationship of the unique  
9 file, so that it makes copyright infringement impossible. If  
10 you are using the ReDigi system, there's no way it can be used  
11 to infringe copyright.

12 THE COURT: If you copied a file onto some other  
13 device, you're saying that ReDigi's software, its server is  
14 able to determine that so that the seller can't have saved the  
15 original someplace else?

16 MR. BECKERMAN: ReDigi does not have super powers to  
17 monitor the entire universe, it has the power to make sure that  
18 its software and its site cannot possibly be used for copyright  
19 infringement. If someone wants to commit a copyright  
20 infringement not using the ReDigi system, ReDigi can't stop  
21 them. But if they ever plug in the device that has that song  
22 on it, the ReDigi system will find it -- not that song, that  
23 unique file, if there's a copy of that unique file on there.

24 THE COURT: In the cloud.

25 MR. BECKERMAN: No, on the client's application, too.

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1 THE COURT: Well, if I have two computers and I have  
2 downloaded a bunch of audio files from iTunes on the computer,  
3 then I burn copies to a CD or to another computer, and then I  
4 try sell -- upload into the cloud and then sell what was on the  
5 computer A, are you telling me that your software is going to  
6 be able to tell you that hey, wait a minute, that guy burned a  
7 copy?

8 MR. BECKERMAN: Absolutely.

9 THE COURT: Absolutely on the sever level?

10 MR. BECKERMAN: The software searches the entire  
11 sever, and if there's any unique file that has ever gone  
12 through their marketplace and is in the hands of someone who is  
13 not the actual purchaser, they will pick it up and they will  
14 force that account to cancel.

15 THE COURT: Is that your understanding, Mr. Mandel?

16 MR. MANDEL: No. Because I think in the hypothetical  
17 we're assuming you don't load to a device -- that you never  
18 connect back to the computer. As far as ReDigi is concerned,  
19 it may seem all perfectly fine because it's not showing up that  
20 you have made a copy and it's been deleted from the computer  
21 that you reconnected to ReDigi, but it's sitting on another  
22 computer has never been connected to ReDigi.

23 THE COURT: That's what I don't know.

24 MR. MANDEL: I don't know how it could.

25 MR. BECKERMAN: I said we cannot police everything, we



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1 can only police the ReDigi system. And there's no way that  
2 that file could ever be sold on the ReDigi marketplace because  
3 they have a record of every single unique file that went  
4 through that sale process.

5 THE COURT: But I don't -- maybe the principal concern  
6 is not somebody selling multiple times the same audio file, the  
7 concern is somebody selling all their audio files but keeping  
8 the same audio files so they have retained and sold at the same  
9 time.

10 MR. BECKERMAN: If they never plugged in the other  
11 computer, and if they did it with software that wasn't ReDigi  
12 software and never plugged into the ReDigi software, then yes,  
13 how would they ever know about it?

14 THE COURT: But that's their principal concern, it  
15 will be Napster with an in-between step, right?

16 MR. MANDEL: Yes.

17 MR. BECKERMAN: It's the same with CDs, it's the same  
18 with audio cassettes, people can infringe copyright, but ReDigi  
19 has nothing to do with it. ReDigi prevents it. If you use  
20 ReDigi software and plug in a storage device that has the song  
21 that's gone through -- a file that's gone through there before,  
22 it will pick that up on the client level, and then there's a  
23 server-wide search and rejects it. It calls it a violation,  
24 and it will not accept it into the cloud.

25 THE COURT: Along those lines then, Mr. Mandel, if you

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1 own any CDs and I download them, I copy them all, in turn  
2 convert them to digital files that I put in a cloud or don't  
3 put in a cloud, I put them somewhere else and sell my CDs, is  
4 that a copyright infringement?

5 MR. MANDEL: No, technically you could do that. You  
6 may be committing an infringement by making the copy possibly  
7 because --

8 THE COURT: That's what I'm asking.

9 MR. MANDEL: You're asking if a copy is --

10 THE COURT: Is making the copy an infringement?

11 MR. MANDEL: I think if you're making it for purposes  
12 of being able to keep something that you are actually trying to  
13 sell but keeping, I think it will be a violation. But I think  
14 that the problem in the digital area is particular because of  
15 the ease with which these files can be reproduced because the  
16 whole history of that. We're dealing with the decades of cases  
17 that in this area the problem is particularly acute, and I  
18 think that the risk we're taking in the kind of hypotheticals  
19 is too great to bear that risk, and certainly where the law has  
20 not at this point set up any defense that allows it. If  
21 Congress is comfortable that the technology is so good or the  
22 right to do this is so important, it can recognize it, but it's  
23 not there at this point, and we think there are real questions  
24 about the technology, because there are ways around it so  
25 easily.

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1 THE COURT: OK. You wanted to say something?

2 MR. BECKERMAN: Just what he says is absolutely  
3 correct, which why they should be embracing the defendant  
4 instead of suing them. They want to make sure they get a piece  
5 of the action. There's a moving declaration for Mr. McMullan  
6 that says well, ReDigi software, they say they do this and they  
7 say they do that, but that can't be possible because we have  
8 been trying for ten years to do that, so it's a ludicrous  
9 statement on their part. But the thing is ReDigi is doing  
10 something that they should have been doing and actually helps  
11 their industry. So all this nonsense about the irreparable  
12 harm is just that.

13 THE COURT: I'm not sure I have to get into whether or  
14 not something helps the industry or not, but it is interesting.

15 I'm going to -- why don't we take a break for a minute  
16 five minutes or so. I'm going to think about what you said and  
17 decide whether I want to rule now or whether I want to reserve.  
18 So let's take five, you can use the restroom, get a drink of  
19 water, and the court reporter may take a drink of water because  
20 the poor man has been working every minute. So thanks.

21 (Recess taken)

22 THE COURT: I think I'm prepared to rule. We have had  
23 almost a couple of hours of argument.

24 I want to thank the parties for their papers and also  
25 for the argument. It was very helpful. Obviously a lot of

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1 time and preparation went into it, and it's always appreciated  
2 by me. I rely on lawyers who educate me and help me get  
3 focused on the issues, so I thank those who spoke and those who  
4 were involved in the preparation, and that might be more than  
5 the lawyers at the tables.

6 I think there's no doubt what the standard is here.  
7 The standard, which I think each of you has quoted to me, is  
8 the *eBay v. MercExchange* case from the Supreme Court. After  
9 that case the Second Circuit sort of revised its own standard  
10 but said there's really no difference between that standard and  
11 the Supreme Court standard, and I think that's true.

12 The key issues really are irreparable harm and  
13 likelihood of success on the merits, or short of that,  
14 whether -- this was the point made in plaintiff's papers --  
15 even if there's not likelihood of success on the merits, that  
16 there is a close or a serious question on a balance of  
17 hardships that tips in favor of the moving party. And then the  
18 other issues that we talked about include the balance of  
19 equities and the public interest.

20 In this case, I think the lack of irreparable harm is  
21 one that really is the issue that causes me to deny the motion.  
22 It seems to me that money damages should be able to take care  
23 of all of this. The Second Circuit in *Salinger* made very clear  
24 what the standard is, and the fact is that this is an  
25 extraordinary remedy, and so a Court will have to consider

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1 whether or not monetary damages are inadequate to compensate  
2 for the injury alleged.

3 In assessing that, the Court has to look to whether  
4 market confusion exists or whether there's a prospect of  
5 difficulty in proving the loss of sales due to infringement. I  
6 think with respect to market confusion, I really don't think  
7 that the market confusion being argued by plaintiffs here is  
8 what is at the heart of demonstrating irreparable harm. The  
9 fact that defendants have espoused a legal theory or defense  
10 both in their papers to the Court and on their Web site and in  
11 public pronouncements doesn't really equate to the kind of  
12 market confusion that the Second Circuit was talking about in  
13 *Salinger*.

14 With respect to the difficult prospect of plaintiff  
15 proving loss of sales due to infringement, I think the  
16 defendant clearly argues that it keeps careful records, and  
17 that if it were found to be infringing on plaintiff's  
18 copyrights, there would be a record from which to calculate  
19 damages. I have seen nothing to refute that, and I'm persuaded  
20 that's the case. So I think there has not been a showing of  
21 irreparable harm that would merit the extraordinary relief  
22 sought here.

23 I think likelihood of success on the merits is  
24 something that plaintiffs have demonstrated. I should bear in  
25 mind or at least repeat what the lawyers already know, which is

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1 that that doesn't mean that I'm finding that the plaintiffs  
2 would win in this case, it's just that they have demonstrated  
3 that there are arguments that on their face look to be  
4 compelling or potentially persuasive arguments. They have  
5 certainly done a good job of articulating those based on the  
6 statute, which I think covers that element.

7 The balance of equities I think is kind of a push. I  
8 think each side has interests that would be affected by the  
9 ruling on a preliminary injunction, and each interest is a  
10 significant one. By virtue of the size of the defendant, if  
11 the Court were to begin a preliminary injunction, that would  
12 have a devastating impact on the company. By the same token,  
13 the plaintiffs have an interest that its copyrights are  
14 protected and enforced. So I think each has a strong interest  
15 in the preliminary injunction that's being sought.

16 And as to the public interest, I think obviously the  
17 public has an interest in seeing copyright law enforced. On  
18 the other hand, that copyright law includes recognitions of  
19 things like legitimate secondary markets and the ability of  
20 owners to resell their items.

21 So I think we've had a preview of what the arguments  
22 are on those fronts, and I think ultimately that's where this  
23 case will be resolved. I'm not resolving it today. I'm not  
24 going to grant the preliminary injunction. As I said, there  
25 hasn't been irreparable harm established.

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1 But I do think with limited discovery we should be  
2 able to get this teed up for summary judgment or a trial  
3 perhaps even on stipulated facts if the parties can get there,  
4 then we should try to resolve this as quickly as possible.  
5 There's no reason why the courts have to be slow and have to be  
6 cumbersome or costly, for that matter. If it is the case that  
7 parties really are in agreement about most of the facts that  
8 are pertinent to this case, I think stipulating to those facts,  
9 identifying where there may be some disputes factually, that  
10 should then be the focus of discovery and will be an efficient  
11 use of time.

12 So what I will do -- well, let me move to the second  
13 contemplated motion, the motion for summary judgment. I think  
14 that's premature at this point because it's not clear to me  
15 that there are wholly undisputed facts.

16 Now the parties seem to push back on me a little for  
17 that one to suggest there are maybe fewer disputed facts than I  
18 imagine. If that's the case, let's get it teed up quickly, but  
19 for now, I think it would be premature to make that motion.  
20 But I say that without prejudice to either side coming back to  
21 me soon with premotion letters saying now we're ready to go,  
22 and explaining what the disputes left are.

23 MR. BECKERMAN: For the record, we withdraw.

24 THE COURT: The letter? You don't have to do that.  
25 There's no offense taken. I don't mean to suggest that.

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1 That's just the way I see it.

2 So what I was going to propose is that I give the  
3 parties maybe a week or ten days to confer and get back to me  
4 with a discovery schedule that should track in general terms my  
5 contemplated case management plan. It's on the Web site, take  
6 a look. And that's not designed to be set in stone, it's not a  
7 one-size-fits-all approach, it's the generally accepted version  
8 that I use. If there are things about this case that are  
9 unique and that should require a tailoring of the case  
10 management plan, I'm open to that. I mean I think courts have  
11 to be practical and responsive and ultimately concerned about  
12 the efficient resolution of disputes.

13 So take a look at it, and then if there are things  
14 that you agree should be tweaked, let me know that, and if you  
15 think there are things about which you disagree, where one of  
16 you thinks that a tweaking will be in order and another thinks  
17 that tweaking would be counter productive, set that out in a  
18 letter that explains your positions.

19 But do you think ten days is enough time?

20 MR. MANDEL: Yes.

21 MR. BECKERMAN: Your Honor, Ty and I have three days  
22 of arbitration during the next five or six days, so I would  
23 appreciate if we could possibly have a little longer time in  
24 which to do that.

25 THE COURT: I don't think it will take too long. Do



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1 take a look at my template. It's basically saying when you're  
2 going to do interrogatories and document requests, when you're  
3 going to do depositions, when you're going to wrap up fact  
4 discovery, and whether you'll have experts and when you'll  
5 finish that up. So take a look at it. I don't think it's too  
6 onerous. It will require a little bit of communication between  
7 the parties. By design it requires that. So if you're  
8 completely engaged in something else that might make it hard  
9 for you, does two weeks make a difference?

10 MR. MANDEL: That's fine, your Honor.

11 THE COURT: Two weeks from today is the 20th, that's a  
12 Court holiday. But what I'm asking you to do is send me, via  
13 email to my chamber's email address, the case management plan,  
14 proposed case management plan, and any correspondence that  
15 requires me to resolve any disputes. So I'll be here, and what  
16 you send me through email I will get in real-time. So that's  
17 fine, so we don't need to worry about the Court holiday.

18 Is there anything else we should cover today?

19 MR. MANDEL: I don't think so, your Honor.

20 THE COURT: Mr. Beckerman?

21 MR. BECKERMAN: No, thank you, your Honor.

22 THE COURT: Let me again thank you. I found it very  
23 interesting and very well argued, so maybe that's why I kept  
24 you all as long as I did. I like to see good lawyers plying  
25 their trade. I will issue a very short order that just

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1 memorializes the result here, but mostly just rely on what I  
2 said on the record.

3 If you need a copy of the transcript, you can take  
4 that up with the court reporter now or later through Web site.

5 MR. MANDEL: Thank you, your Honor.

6 MR. BECKERMAN: Thank you, your Honor.

7 THE COURT: Thanks very much, have a good day.

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